
RESPECT FOR THE CONVENTION

- ❖ Text of the provision
The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.
- ❖ Reservations or declarations
None

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A. Introduction

- 151 In the very first article of each of the four 1949 Geneva Conventions, the High Contracting Parties ‘undertake to respect and to ensure respect for the present Convention in all circumstances’. This clause attests to the special character of the Conventions, a great many of whose rules give expression to ‘elementary considerations of humanity’.¹ The High Contracting Parties therefore deemed it appropriate to explicitly reiterate the general principle that the Conventions are binding upon its Parties, which have ‘to respect’ them. Moreover, the High Contracting Parties commit themselves to do everything reasonably in their power ‘to ensure respect’ for the Conventions. The phrase ‘to respect and to ensure respect’ applies first and foremost to the High Contracting Parties themselves, their armed forces, other persons and groups acting on their behalf, and their populations as a whole.
- 152 In addition, the High Contracting Parties undertake, whether or not they are themselves party to an armed conflict, to ensure respect for the Conventions by other High Contracting Parties and non-State Parties to an armed conflict. The interests protected by the Conventions are of such fundamental importance to the human person that every High Contracting Party has a legal interest in their observance, wherever a conflict may take place and whoever its victims may be.² Moreover, the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally. The Conventions thus create obligations *erga omnes partes*, i.e. obligations towards all of the other High Contracting Parties.³

¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 218, with regard to common Article 3 (‘they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity”’); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, para. 79: ‘It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” ... that the Hague and Geneva Conventions have enjoyed a broad accession.’

² Similar considerations apply, for example, to the 1948 Genocide Convention, in which ‘the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention’; ICJ, *Reservations to the Genocide Convention*, Advisory Opinion, 1951, p. 23.

³ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 157 (‘In the Court’s view, these rules [of humanitarian law applicable in armed conflict] incorporate obligations which are essentially of an *erga omnes* character.’); ICTY, *Kupreškić* Trial Judgment, 2000, para. 519 (‘norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather ... they lay down obligations towards the international community as a whole’); and Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, pp. 17–18 (‘it is not merely an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties.’).

- 153 The interpretation of common Article 1, and in particular the expression 'ensure respect', has raised a variety of questions over the last decades. In general, two approaches have been taken. One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties. This view was already expressed in the 1960 ICRC Commentary.⁴ Developments in customary international law have since confirmed this view.⁵
- 154 Common Article 1 is not a mere stylistic clause but is invested with imperative force and counts among the means available to ensure compliance with the Conventions. By committing themselves to 'respect and ensure respect' for the Conventions, States have also recognized the importance of adopting all reasonable measures to prevent violations from happening in the first place.

B. Historical background

- 155 The 1864 and 1906 Geneva Conventions did not contain a provision similar to common Article 1. Even so, the first element of common Article 1 ('to respect') and that of ensuring respect by one's own armed forces was already implicit in the 1864 Convention, which stated: 'The implementing of the present Convention shall be arranged by the Commanders-in-Chief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention.'⁶ The provision, phrased in similar terms, was reproduced in the 1906 Geneva Convention and the 1907 Hague Convention (X).⁷
- 156 The principle of *pacta sunt servanda* ('agreements must be honoured'), complemented by the words 'in all circumstances', was for the first time expressly spelled out in the two Geneva Conventions of 1929: 'The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.'⁸ In the original draft, this phrase was linked to the obligation to apply the Conventions in relation to other Contracting Parties, even if not all belligerents were party to the Conventions. In the course of the drafting

⁴ Pictet (ed.), *Commentary on the Third Geneva Convention*, 1960, p. 18 (while the English version of the Commentary states that 'each of the other Contracting Parties ... *should* endeavour to bring it back to an attitude of respect' (emphasis added), the French original uses the verb 'doit' ('must'), thus making it clear that it was seen as an obligation).

⁵ See ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 220, and ICRC Study on Customary International Humanitarian Law (2005), Rule 144.

⁶ Geneva Convention (1864), Article 8.

⁷ Geneva Convention (1906), Article 25; Hague Convention (X) (1907), Article 19.

⁸ Geneva Convention on the Wounded and Sick (1929), Article 25, first paragraph; Geneva Convention on Prisoners of War (1929), Article 82, first paragraph.

process, however, these obligations were separated into two different paragraphs, whereby the obligation to respect the Convention in all circumstances acquired an independent meaning.⁹

- 157 In 1948, in the drafts submitted to the 17th International Conference of the Red Cross in Stockholm, the obligation to respect the Conventions in all circumstances was moved to its present, prominent position in Article 1 of the four Conventions and the element of 'ensure respect' was added in order to 'stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention' but 'must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied'.¹⁰ Article 1 of the draft conventions thus read: 'The High Contracting Parties undertake, in the name of their peoples, to respect, and to ensure respect for the present Convention in all circumstances.'¹¹ The same text, apart from the phrase 'in the name of their peoples', which had been removed by the Stockholm Conference,¹² was proposed to the Diplomatic Conference the following year and adopted without much discussion, after only a handful of delegations had commented on the provision.¹³

C. Scope of application

1. *Rules applicable in international and non-international armed conflict*

- 158 The High Contracting Parties undertake to respect and to ensure respect for 'the present Convention' in all circumstances. This wording covers not only the provisions applicable to international armed conflict, including occupation, as defined by common Article 2, but also those applicable to non-international armed conflict under common Article 3, which forms part of 'the present Convention'. Thus, the High Contracting Parties must also ensure respect for the rules applicable in non-international armed conflict, including by non-State armed groups (for details on the extent of this obligation, see

⁹ The obligation to ensure respect in all circumstances became the first paragraph of Article 25 of the 1929 Geneva Convention on the Wounded and Sick, and the obligation to apply the Conventions in relation to other Contracting Parties, even if not all belligerents are party to the Conventions, became the second paragraph. Article 82 of the 1929 Geneva Convention on Prisoners of War was similarly worded. For a detailed overview of the drafting history, see Kalshoven, pp. 6–10.

¹⁰ *Draft Conventions submitted to the 1948 Stockholm Conference*, p. 5.

¹¹ *Ibid.* pp. 4, 34, 51 and 153 for the four draft conventions, respectively.

¹² *Draft Conventions adopted by the 1948 Stockholm Conference*, pp. 9, 31, 51 and 114.

¹³ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 53 (statements by France, Italy, Norway and the United States). See also the remarks made on other occasions by the delegates of Monaco (p. 79) and France (p. 84).

sections E.2 and E.3).¹⁴ This interpretation corresponds with the fundamental nature of common Article 3, which has been qualified by the International Court of Justice as a 'minimum yardstick' in the event of any armed conflict.¹⁵

159 In addition, according to the 2005 ICRC Study on Customary International Humanitarian Law, the obligation to respect and ensure respect is not limited to the Geneva Conventions but to the entire body of international humanitarian law binding upon a particular State.¹⁶

2. Rules applicable in armed conflict and in peacetime

160 The obligation to respect and to ensure respect for the Conventions is not limited, however, to armed conflict, but applies equally in peacetime. Otherwise, the obligation could have been addressed to the 'Parties to the conflict' rather than to the 'High Contracting Parties' more generally. During the discussions at the 1929 Diplomatic Conference, this implication was specifically alluded to in response to concerns raised by China that the original wording of the draft article proposed by the ICRC – 'in case of war' – did not take into account those provisions of the Convention that were applicable in peacetime.¹⁷

161 Thus, the obligations to respect and to ensure respect also cover those provisions of the Conventions that expressly apply already in peacetime. These rules are also alluded to in common Article 2(1) ('In addition to the provisions which shall be implemented in peacetime').¹⁸

162 The broad temporal scope of application is also reflected in the phrase 'in all circumstances', which has been interpreted to mean both during armed conflict and in peacetime.¹⁹

¹⁴ See ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 220. But see Reid, who does 'not consider this an essential element of the obligation contained in Common Article 1'.

¹⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 218.

¹⁶ ICRC Study on Customary International Humanitarian Law (2005), Rule 139.

¹⁷ *Proceedings of the Geneva Diplomatic Conference of 1929*, pp. 329–330.

¹⁸ For further details, see the commentary on common Article 2, section C. For a more sceptical perspective, see Focarelli, p. 159.

¹⁹ See Des Gouttes, *Commentaire de la Convention de 1929 sur les blessés et malades*, ICRC, 1930, p. 186: 'On a voulu signaler ici que la Convention doit s'appliquer en toutes circonstances – ce que ne disait pas celle de 1906 – en temps de paix comme en temps de guerre, quant aux dispositions qui se trouvent applicables dans l'un comme dans l'autre cas. On a insisté sur son caractère d'obligation générale.' ('The desire here was to make it clear that the Convention must be applied in all circumstances – something that was not specified in the 1906 Convention – both in time of peace and in time of war, with respect to the provisions that are applicable in either of these situations. The emphasis was to be on the general character of the obligation.')

D. Addressees of common Article 1

163 This section sets out which actors are bound by the obligations to respect and to ensure respect for the Conventions. For further details on the content of these obligations, see section E.

1. *High Contracting Parties*

164 Common Article 1 is addressed to the 'High Contracting Parties'. Contrary to some other provisions in the Convention, it is not addressed to the 'Parties to the conflict'. Hence, it does not cover non-State armed groups which are party to a non-international armed conflict.

165 Nevertheless, it follows from common Article 3, which is binding on all Parties to a conflict, that non-State armed groups are obliged to 'respect' the guarantees contained therein.²⁰ Furthermore, such groups have to 'ensure respect' for common Article 3 by their members and by individuals or groups acting on their behalf.²¹ This follows from the requirement for armed groups to be organized and to have a responsible command which must ensure respect for humanitarian law. It is also part of customary international law.²²

2. *High Contracting Parties engaged in multinational operations*

166 Questions on the application of common Article 1 may arise where the High Contracting Parties engage in multinational operations, i.e. operations conducted by the forces of two or more States under the auspices of an international organization, a permanent alliance or an ad hoc coalition. Examples include operations carried out under the umbrella of the United Nations or a regional organization.

167 Such operations may take a variety of forms, differing in the extent to which States retain authority over their forces. In practice, however, troop-contributing countries never transfer full 'command' to the State or international organization leading an operation but only 'operational control' or

²⁰ For more details on the binding nature of common Article 3 on all Parties to the conflict, see the commentary on that article, section D.1.

²¹ See also the commentary on Article 3, section M.5.a, and Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002, pp. 92–93. For some tools, see e.g. ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, 2008, and Sandesh Sivakumaran, 'Implementing humanitarian norms through non-State armed groups', in Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge University Press, 2015, pp. 125–146.

²² See ICRC Study on Customary International Humanitarian Law (2005), Rule 139, and Henckaerts/Doswald-Beck, commentary on Rule 139, pp. 497–498.

sometimes 'operational command'.²³ In addition, States almost always retain disciplinary control and criminal jurisdiction over their national contingents.

168 This may raise questions about the extent to which the conduct of these contingents is still attributable to the High Contracting Parties and thus about which subject(s) of international law may be held responsible for their conduct. This is a question of international law on the responsibility of States and of international organizations that is independent of common Article 1.²⁴ Irrespective of attribution, the High Contracting Parties remain bound to respect and to ensure respect for the Conventions during multinational operations.

169 The fact of participating in a multinational operation does not release the High Contracting Parties from their obligations under common Article 1. To the extent that they always retain some authority over their national contingents, the High Contracting Parties must continue to ensure respect for the Conventions by these contingents. They may fulfil this obligation, in particular, by ensuring that their troops are adequately trained, equipped and instructed;²⁵ by exercising the disciplinary and criminal powers remaining to them; by attempting to ensure their coalition partners desist in potentially unlawful conduct; and, ultimately, by opting out of specific operations if there is an expectation that these operations may violate the Conventions.²⁶

170 As a result, the High Contracting Parties remain bound to ensure respect for the Conventions; they may not evade their obligations by placing their contingents at the disposal of an international organization, a permanent alliance or an ad hoc coalition.²⁷ Following this logic, they should make their transfer of command and control conditional on adequate guarantees of compliance with the Conventions by these contingents.²⁸

²³ For a definition of these terms, see Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, 2nd edition, Oxford University Press, 2015, pp. 675 and 681–682.

²⁴ See Draft Articles on State Responsibility (2001), Articles 4–5 and 8, and Draft Articles on the Responsibility of International Organizations (2011), Articles 6–7.

²⁵ See e.g. 20th International Conference of the Red Cross, Vienna, 1965, Res. XXV, Application of the Geneva Conventions by the United Nations Emergency Forces, para. 2 (recommending, following a reference to common Article 1 in the Preamble, that 'the Governments of countries making contingents available to the United Nations give their troops – in view of the paramount importance of the question – adequate instruction in the Geneva Conventions before they leave their country of origin as well as orders to comply with these Conventions').

²⁶ For further details on the negative and positive aspects of the obligation to ensure respect for the Conventions by other Parties to a conflict, see section E.3.

²⁷ Draft Articles on the Responsibility of International Organizations (2011), Article 61. See also Naert, p. 510.

²⁸ See e.g. 20th International Conference of the Red Cross, Vienna, 1965, Res. XXV, Application of the Geneva Conventions by the United Nations Emergency Forces, para. 1 (recommending that 'appropriate arrangements be made to ensure that armed forces placed at the disposal of the United Nations observe the provisions of the Geneva Conventions'). Naert, p. 511, considers that common Article 1 may 'reinforce a State's obligations not to endow international organizations with powers without adequate guarantees'. See also Zwanenburg, p. 108 ('Arguably, a state's transfer of powers over part of its armed forces to an international

3. *International organizations*

- 171 In addition to the troop-contributing countries themselves, an international organization which exercises command and control over national contingents or which has mandated the recourse to armed force by its Member States is also obliged to respect and to ensure respect for the Conventions by these forces.
- 172 International organizations are – in the current state of international law – not directly or formally bound by the Conventions because only States may become ‘High Contracting Parties’. However, it is now widely agreed that, as subjects of international law, they are bound by customary international humanitarian law,²⁹ and thus also by the obligations to respect and to ensure respect for that body of law.³⁰
- 173 To the extent that an international organization exercises command and control in respect of an operation, it is obliged to respect and to ensure respect for humanitarian law by the national contingents placed at its disposal in essentially the same way as States must respect and ensure respect for the Conventions by their armed forces. For example, the United Nations systematically provides training in humanitarian law for the personnel of its military contingents, both at the start and in the course of their deployment.³¹
- 174 The applicability of humanitarian law to UN forces has been affirmed by the 1999 UN Secretary-General’s Bulletin, which was promulgated ‘for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control’ and may be seen as a means to respect and to ensure respect for humanitarian law.³² In addition, status of forces agreements (SOFAs) concluded between the United Nations and a State hosting a UN peace operation typically require the United Nations to ensure that its operation is conducted ‘with full respect for the principles and rules of the international conventions applicable to the conduct of military personnel’, including

organization without adequate guarantees that the organization will respect humanitarian law breaches such an obligation.’).

²⁹ See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949, p. 179; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980, para. 37; and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*, Advisory Opinion, 1996, para. 25, holding that ‘international organizations ... do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers’. For a discussion of the implications of this principle for the applicability of humanitarian law to international organizations, see Kolb/Porretto/Vité, pp. 121–143; Naert, pp. 533–534; Shrager, 1998, p. 77; and Engdahl, p. 519.

³⁰ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 160; ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 93; see also Boisson de Chazournes/Condorelli, 2000, p. 70; Boisson de Chazournes/Condorelli, 2006, pp. 15–16; and Engdahl, p. 517.

³¹ See e.g. Agreement between the UN and the AU and the Government of Sudan concerning the Status of the AU/UN Hybrid Operation in Darfur (2008).

³² UN Secretary-General’s Bulletin (1999), Preamble.

‘the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict’, and place a corresponding duty on the host State to treat at all times the military personnel of the operation with full respect for such principles and rules.³³

- 175 At the same time, and even absent any such exercise of command and control, international organizations, whether or not they are themselves party to the conflict, are also obliged under customary international law to ensure respect by others.³⁴ This is particularly the case where the organization has mandated the use of armed force in the first place,³⁵ or engages in operations in support of other Parties to the conflict.³⁶

E. The obligations flowing from common Article 1

1. *The obligations to respect and to ensure respect by the armed forces and other persons or groups whose conduct is attributable to the High Contracting Parties*

- 176 The duty to respect the Geneva Conventions reaffirms the general principle of the law of treaties ‘*pacta sunt servanda*’ as codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

³³ See e.g. The Status of Forces Agreement between the United Nations and the Government of Republic of South Sudan concerning the United Nations Mission in South Sudan (UNMISS), Juba, 8 August 2011, paras 6(a) and (b). While such provisions are not included in the ‘Model status-of-forces agreement for peace-keeping operations’ as prepared by the UN Secretary-General at the request of the General Assembly (UN Doc. A/45/594, 9 October 1990), they have been included in relevant SOFAs since the UN concluded such an agreement with Rwanda in respect of the UN Assistance Mission in Rwanda (UNAMIR) on 5 November 1993, United Nations *Treaty Series*, Vol. 1748, pp. 3–28.

³⁴ See Shraga, 1998, p. 71, and David, para. 3.13a. The obligation to ensure respect by others was alluded to by the ICJ in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 160, specifically with regard to the UN, which it addresses last, in three paragraphs (paras 158–160) dealing with the obligations to respect and to ensure respect for humanitarian law: ‘Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.’

³⁵ See Shraga, 1998, pp. 71–72, and Kolb/Porretto/Vité, pp. 153–154 and 332–333.

³⁶ See UN Secretary-General, *Human rights due diligence policy on United Nations support to non-United Nations security forces*, UN Doc. A/67/775-S/2013/110, 5 March 2013. For a practical example, see e.g. UN Security Council, Res. 1906, 23 December 2009, para. 22: ‘Reiterates ... that the support of MONUC [United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (DRC)] to FARDC [Armed Forces of the DRC]-led military operations against foreign and Congolese armed groups is strictly conditioned on FARDC’s compliance with international humanitarian, human rights and refugee law and on an effective joint planning of these operations.’

- 177 Acts or omissions which amount to breaches of the Conventions entail the international responsibility of a High Contracting Party, provided those acts or omissions are attributable to that Party according to the rules on State responsibility. This concerns not only the conduct of State organs as defined by the internal law of the State but also that of other persons or groups acting on its behalf, such as volunteer and militia forces within the meaning of Article 4A(2) of the Third Convention, other armed groups under the requisite control of the State, and in certain cases private military and security companies whose services are contracted by the State.³⁷ As far as this principle is concerned, common Article 1 does not add anything new to what is already provided for by general international law.
- 178 The novelty of the provision lies in the addition of the duty to 'ensure respect', which must be done 'in all circumstances'. This sets a clear standard, as 'ensuring' means 'to make certain that something will occur or be so' or inversely 'make sure that (a problem) does not occur'.³⁸ States are thus required to take appropriate measures to prevent violations from happening in the first place.³⁹ Accordingly, the High Contracting Parties must – starting in peacetime – take all measures necessary to ensure respect for the Conventions.⁴⁰ Respecting the Conventions in case of an armed conflict regularly presupposes that preparations have been made in advance.⁴¹
- 179 In principle, the High Contracting Parties have some latitude in choosing the measures by which to ensure respect for the Conventions, as long as these are adequate to achieve the desired result. Their margin of choice is limited, however, especially in cases where the Conventions oblige the High Contracting Parties to take specific measures. The Conventions contain a number of provisions designed to ensure their implementation by the High Contracting Parties:

– *Instruction within armed forces*: The High Contracting Parties are required to disseminate the Conventions as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction.⁴²

³⁷ On private military and security companies contracted by a State, see Montreux Document on Private Military and Security Companies (2008), Part I, para. 7.

³⁸ *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 475.

³⁹ See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL (2005), para. 3(a).

⁴⁰ See also common Article 2(1) ('In addition to the provisions which shall be implemented in peacetime'); First Convention, Article 45; and Second Convention, Article 46. See also Additional Protocol I, Article 80.

⁴¹ On preparatory measures, see the commentary on Article 2, section C.

⁴² First Convention, Article 47; Second Convention, Article 48; Third Convention, Article 127; Fourth Convention, Article 144. These provisions are supplemented by Additional Protocol I, Article 83; Additional Protocol II, Article 19; and Additional Protocol III, Article 7.

- *Rules of application*: The High Contracting Parties are required to communicate to one another official translations of the Conventions, as well as laws and regulations they may adopt to ensure their application.⁴³
- *Suppression of breaches*: The High Contracting Parties are required to search for, prosecute or extradite alleged perpetrators of grave breaches ‘regardless of their nationality’ and to enact any necessary legislation in this respect. They are further required to suppress all other breaches of the Conventions.⁴⁴
- *Abuses of the emblem*: The High Contracting Parties are required, if their legislation is not already adequate, to take measures necessary for the prevention and repression, at all times, of abuses of the emblem.⁴⁵

180 The Conventions propose several other measures by which the High Contracting Parties may ensure respect, notably appointing a Protecting Power or a substitute,⁴⁶ and using the enquiry procedure provided for in the Conventions.⁴⁷

181 In addition, a number of measures can be seen as implicit in the Conventions or are considered part of customary international law and should therefore be adopted by States as means to fulfil their obligations to respect and to ensure respect for the Conventions. These include, in particular, giving orders and instructions to subordinate personnel to ensure respect for the Conventions and supervising their implementation,⁴⁸ and making legal advisers available to the armed forces when necessary.⁴⁹

⁴³ First Convention, Article 48; Second Convention, Article 49; Third Convention, Article 128; Fourth Convention, Article 145. These provisions are supplemented by Additional Protocol I, Article 84.

⁴⁴ First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146. These provisions are supplemented by Additional Protocol I, Article 85.

⁴⁵ First Convention, Article 54; Second Convention, Article 45. These provisions are supplemented by Additional Protocol I, Article 18, and Additional Protocol III, Article 6.

⁴⁶ First Convention, Articles 8 and 10; Second Convention, Articles 8 and 10; Third Convention, Articles 8 and 10; Fourth Convention, Articles 9 and 11.

⁴⁷ First Convention, Article 52; Second Convention, Article 53; Third Convention, Article 132; Fourth Convention, Article 149. These provisions are supplemented by the creation of the International Humanitarian Fact-Finding Commission pursuant to Additional Protocol I, Article 90.

⁴⁸ See Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 18 (‘It is self-evident that it would not be enough for a Government to give orders or directions and leave the military authorities to arrange as they pleased for their detailed execution. It is for the Government to supervise the execution of the orders it gives.’); Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 41 (‘[T]he duty to respect implies that of ensuring respect by civilian and military authorities, the members of the armed forces, and in general, by the population as a whole. This means not only that preparatory measures must be taken to permit the implementation of the Protocol, but also that such implementation should be supervised. In this respect, the phrase “to ensure respect” essentially anticipates the measures for execution and supervision laid down in Article 80 (“Measures for execution”).’) See also Additional Protocol I, Article 80(2).

⁴⁹ See Additional Protocol I, Article 82, and ICRC Study on Customary International Humanitarian Law (2005), Rule 141.

182 States party to a non-international armed conflict may ensure respect for their obligations under common Article 3 through essentially the same measures. Common Article 3(3) specifically requires the Parties to the conflict to endeavour to conclude special agreements in order to bring into force all or parts of the other provisions of the Conventions.

2. *The obligation to ensure respect by the whole population over which a High Contracting Party exercises authority*

183 The duty to ensure respect covers not only the armed forces and other persons or groups acting on behalf of the High Contracting Parties but extends to the whole of the population over which they exercise authority, i.e. also to private persons whose conduct is not attributable to the State.⁵⁰ This constitutes a general duty of due diligence to prevent and repress breaches of the Conventions by private persons over which a State exercises authority, including persons in occupied territory.⁵¹ This is an obligation of means, whose content depends on the specific circumstances, in particular the foreseeability of the violations and the State's knowledge thereof, the gravity of the breach, the means reasonably available to the State and the degree of influence it exercises over the private persons.⁵²

184 In addition, a number of provisions in the Conventions expressly require the High Contracting Parties to take measures to ensure respect for the Conventions by private persons:

- *Dissemination among the civilian population*: The High Contracting Parties undertake to include the study of the Conventions, if possible, in their programmes of civil instruction, so that the principles thereof may become known to the entire population.⁵³
- *Suppression of breaches*: The High Contracting Parties are required to search for, prosecute or extradite alleged perpetrators of grave breaches 'regardless of

⁵⁰ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 53 (Norway, United States) ('ensure respect of the Conventions by the population as a whole'). See also Inter-American Court of Human Rights, *Mapiripán Massacre v. Colombia*, Judgment, 2005, para. 114.

⁵¹ See Koivurova, para. 32; Sassòli, pp. 411–412; and Ryngaert/Van de Meulebroucke, pp. 462–463.

⁵² On the standard of due diligence, see ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, paras 430–431. See also Pisillo-Mazzeschi, p. 45, and Ryngaert/Van de Meulebroucke, p. 463. For an interpretation of the due diligence standard in the context of human rights law, see European Court of Human Rights, *Osman v. UK*, Judgment, 1998, paras 115–116; Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Judgment, 1988, paras 172–175; *Pueblo Bello v. Colombia*, Judgment, 2006, paras 123–141; UN Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8; African Commission on Human and Peoples' Rights, *Association of Victims of Post Electoral Violence @ INTERIGHTS v. Cameroon*, Decision, 2009, paras 89–92.

⁵³ First Convention, Article 47; Second Convention, Article 48; Third Convention, Article 127; Fourth Convention, Article 144. These provisions are supplemented by Additional Protocol I, Article 83(1).

their nationality' and to suppress all other breaches of the Conventions. This includes breaches committed by private persons.⁵⁴

185 Several other provisions oblige the High Contracting Parties more generally to *protect* specific persons or objects, which includes their protection against acts of private persons. These provisions cover some of the following areas:

- *Wounded, sick and shipwrecked*: The First and Second Conventions require that the wounded, sick and shipwrecked be respected and protected in all circumstances.⁵⁵ The First Convention, in particular, enjoins the civilian population to respect the wounded and sick and to abstain from offering them violence.⁵⁶ Furthermore, the First and Second Conventions explicitly state the duty to protect the wounded, sick and shipwrecked against pillage and ill-treatment.⁵⁷
- *Medical units and establishments, medical and religious personnel, medical transports*: The First and Second Conventions provide for the respect and protection of fixed establishments and mobile medical units of the medical service, medical and religious personnel, medical transports, and hospital ships and their crews.⁵⁸
- *The dead*: The First and Second Conventions set out the duty to prevent the dead from being despoiled. This includes acts of despoliation committed by the civilian population.⁵⁹
- *Prisoners of war*: The Third Convention provides for the duty to protect prisoners of war at all times, particularly against acts of violence or intimidation and against insults and public curiosity.⁶⁰
- *Civilian wounded and sick, the infirm, expectant mothers*: The Fourth Convention requires that the wounded and sick, as well as the infirm and expectant mothers, be given particular protection and respect. This includes protection from any violence, harassment or other improper acts by the civilian population.⁶¹

⁵⁴ First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146. These provisions are supplemented by Additional Protocol I, Article 85.

⁵⁵ First Convention, Article 12(1); Second Convention, Article 12(1). These provisions are supplemented by Additional Protocol I, Article 10, and Additional Protocol II, Article 7.

⁵⁶ First Convention, Article 18(2). This provision is supplemented by Additional Protocol I, Article 17(1) which extends protection to the wounded, sick and shipwrecked.

⁵⁷ First Convention, Article 15(1); Second Convention, Article 18(1).

⁵⁸ First Convention, Articles 19(1), 24, 25, 26 and 35(1); Second Convention, Articles 22(1), 24, 25, 27, 36 and 37(1). These provisions are supplemented by Additional Protocol I, Article 12 (medical units) and Articles 21–31 (medical transportation).

⁵⁹ First Convention, Article 15(1); Second Convention, Article 18(1). These provisions are supplemented by Additional Protocol I, Article 34.

⁶⁰ Third Convention, Article 13(2).

⁶¹ Fourth Convention, Article 16.

- *Civilian hospitals and their staff*: The Fourth Convention provides for the protection of civilian hospitals and their staff, as well as the transportation of wounded and sick civilians, the infirm and maternity cases.⁶²
- *Protected persons*: The Fourth Convention provides for the duty to respect protected persons, and especially to protect them against all acts of violence or threats thereof and against insults and public curiosity.⁶³
- *Women*: The Third Convention requires that women be treated with all the regard due to their sex and that they in all cases benefit by treatment as favourable as that granted to men.⁶⁴ The Fourth Convention provides for the duty to protect women against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.⁶⁵

3. *The obligation to ensure respect by others*

- 186 The obligation to ensure respect also has an external dimension related to ensuring respect for the Conventions by others that are Party to a conflict. Accordingly, States, whether neutral, allied or enemy, must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict.
- 187 This duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict. Under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end. This external dimension of the obligation to ensure respect for the Conventions goes beyond the principle of *pacta sunt servanda*.
- 188 Common Article 1 does not spell out whose respect for the Conventions must be ensured, and it has been argued that the drafters only intended to impose a duty on States to ensure respect by their peoples.⁶⁶ The statements made by the delegates of Norway and the United States during the Diplomatic Conference leading to the adoption of the Conventions indicate that they understood the phrase 'to ensure respect' essentially as an undertaking by States to ensure respect for the Conventions by their populations as a whole.⁶⁷

⁶² Fourth Convention, Articles 18(1), 20(1), 21 and 22. These provisions are supplemented by Additional Protocol I, Article 12 (medical units), Article 15 (civilian medical personnel) and Articles 21–31 (medical transportation).

⁶³ Fourth Convention, Article 27(1).

⁶⁴ Third Convention, Article 14.

⁶⁵ Fourth Convention, Article 27(2). This provision is supplemented by Additional Protocol I, Article 76(1).

⁶⁶ See Kalshoven, p. 28.

⁶⁷ *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 53 (Norway and United States).

The drafters did, however, agree upon a very broad formulation. Taking into consideration the overwhelming humanitarian importance of the Geneva Conventions and the timing of their drafting – shortly after the end of the Second World War – this broad formulation accommodates the external dimension of the obligation to ensure respect for the Conventions. In statements prior to the 1948 Stockholm Conference and during the 1949 Diplomatic Conference of 1949, the ICRC made clear that in its view common Article 1 meant that the Contracting Parties ‘should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied’.⁶⁸

189 Subsequent practice has confirmed the existence of an obligation to ensure respect by others under common Article 1. The obligation was expressly acknowledged by the Teheran Conference on Human Rights in 1968,⁶⁹ and subsequently referred to by the UN General Assembly.⁷⁰ It was in full knowledge of these developments that the clause was reaffirmed in Article 1(1) of Additional Protocol I,⁷¹ and later in Article 38(1) of the 1989 Convention on the Rights of the Child and Article 1(1) of the 2005 Additional Protocol III. The 2013 Arms Trade Treaty, which subjects arms transfer decisions to respect for humanitarian law by the recipient, refers explicitly to the obligations to respect and to ensure respect.⁷² The obligation to ensure respect by others was explicitly endorsed by the International Court of Justice,⁷³ the UN Security Council,⁷⁴ the International Conference of the Red Cross and Red Crescent⁷⁵

⁶⁸ *Ibid.* For the original statement, see *Draft Conventions submitted to the 1948 Stockholm Conference*, p. 5:

The ICRC believes it necessary to stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention. They must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied.

⁶⁹ International Conference on Human Rights, Tehran, 1968, Res. XXIII, Human Rights in Armed Conflict, Preamble.

⁷⁰ UN General Assembly, Res. 2851 (XXVI), Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, 20 December 1971, Preamble and para. 9.

⁷¹ See e.g. ICRC, Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, Geneva, 1973, p. 19; Levrat, p. 269; and Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 44. But see Kalshoven, p. 52, who considers that ‘the (incontestable) reiteration and (merely technical) reaffirmation of the text of common Article 1 in Protocol I cannot seriously be claimed to express anything like a full understanding and wish of that Conference with respect to the text they were simply repeating verbatim’.

⁷² Arms Trade Treaty (2013), Preamble, 5th paragraph of the ‘Principles’.

⁷³ ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 220; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, paras 158–159; and *Armed Activities on the Territory of the Congo case*, Judgment, 2005, paras 211 and 345.

⁷⁴ UN Security Council, Res. 681, 20 December 1990, para. 5.

⁷⁵ 25th International Conference of the Red Cross, Geneva, 1986, Res. I, Respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions, para. 5; 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995, Res. I, International humanitarian law: From law to action. Report on the follow-up to the International Conference for the Protection of War Victims, para. 2, and Res. II, Protection of the civilian population in period of armed conflict, para. A(a); 27th International Conference of the Red Cross and Red Crescent, Geneva, 1999, Res. I, Adoption of the

and the High Contracting Parties meeting in other forums.⁷⁶ The ICRC has taken a number of steps, confidentially or publicly, to encourage States, even those not party to a conflict, to use their influence or offer their cooperation to ensure respect for the Conventions.⁷⁷

- 190 As mentioned, the duty to ensure respect by others comprises both negative and positive obligations:

a. Negative obligations

- 191 Pursuant to common Article 1, the High Contracting Parties have certain negative obligations, which means they must abstain from certain conduct. In particular, they may neither encourage, nor aid or assist in violations of the Conventions.⁷⁸ It would be contradictory if common Article 1 obliged the High Contracting Parties to 'respect and to ensure respect' by their own armed forces while allowing them to contribute to violations by other Parties to a conflict. Accordingly, the International Court of Justice recognized in 1986 the negative obligation 'not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions'.⁷⁹ This obligation 'not to encourage' has also been expressly acknowledged by the High Contracting Parties themselves.⁸⁰
- 192 In addition, under general international law States are responsible for knowingly aiding or assisting another State in the commission of an internationally wrongful act.⁸¹ According to the International Law Commission,

Declaration and the Plan of Action, Final goal 1.1, para. 1; 28th International Conference of the Red Cross and Red Crescent, Geneva, 2003, Res. 1, Adoption of the Declaration and Agenda for Humanitarian Action, Final Goal 2.3; and 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, para. 2.

⁷⁶ See e.g. International Conference for the Protection of War Victims, Geneva, 1993, Final Declaration, Part II, para. 11; Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, para. 4; and Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 17 December 2014, Declaration, para. 4.

⁷⁷ See e.g. ICRC, 'Israel and the occupied and autonomous Palestinian territories: Deliberate attacks on civilians must stop', News Release, 10 September 2003; 'Myanmar: ICRC denounces major and repeated violations of international humanitarian law', News Release, 29 June 2007; 'Rwanda: ICRC sounds alarm on appalling prison conditions' News Release, 31 March 1995; 'Conflict in Southern Africa', ICRC Appeal, 19 March 1979, reproduced in *International Review of the Red Cross*, Vol. 19, No. 209, April 1979, pp. 85–90, at 89; 'Conflict between Iraq and Iran', ICRC Appeal, 11 May 1983, reproduced in *International Review of the Red Cross*, Vol. 23, No. 235, August 1983, pp. 220–222, at 222; 'Conflict between Iraq and Iran', Second ICRC Appeal, 15 February 1984, reproduced in *International Review of the Red Cross*, Vol. 24, No. 239, April 1984, pp. 113–115, at 115; and 'ICRC appeal for a humanitarian mobilization', reproduced in *International Review of the Red Cross*, Vol. 25, No. 244, October 1985, pp. 30–34, at 33.

⁷⁸ On the corresponding customary duty to ensure respect, see ICRC Study on Customary International Humanitarian Law (2005), Rule 144 ('States may not encourage violations of international humanitarian law by parties to an armed conflict.').

⁷⁹ ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 220.

⁸⁰ 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, para. 2.

⁸¹ See Draft Articles on State Responsibility (2001), Article 16.

this requires that 'the relevant State organ *intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.⁸² The subjective element of 'intent' is unnecessary, however, for the purposes of common Article 1. In line with the rationale laid out in the preceding paragraph, common Article 1 does not tolerate that a State would knowingly contribute to violations of the Conventions by a Party to a conflict, whatever its intentions may be.

- 193 Common Article 1 and the rules on State responsibility thus operate at different levels. The obligation to ensure respect for the Conventions is an autonomous primary obligation that imposes more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting. What is at stake is more than aid or assistance to violations of the rules of international law but concerns aid or assistance to violations of rules whose observance the High Contracting Parties have specifically undertaken to respect and ensure respect for.⁸³ Financial, material or other support in the knowledge that such support will be used to commit violations of humanitarian law would therefore violate common Article 1, even though it may not amount to aiding or assisting in the commission of a wrongful act by the receiving States for the purposes of State responsibility.
- 194 In the event of multinational operations, common Article 1 thus requires High Contracting Parties to opt out of a specific operation if there is an expectation, based on facts or knowledge of past patterns, that it would violate the Conventions, as this would constitute aiding or assisting violations.
- 195 An illustration of a negative obligation can be made in the context of arms transfers. Common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions.⁸⁴
- 196 Lastly, under general international law, there are additional negative obligations, namely not to recognize as lawful a situation created by a serious breach

⁸² *Ibid.* commentary on Article 16, para. 5 (emphasis added). See also para. 9 with regard to human rights abuses. For a critique of the reference to 'intent' in this context, see Boivin, pp. 471–472, with further references.

⁸³ See also in the context of arms transfers, Sassòli, p. 413, who considers that once a State knows that the receiving State systematically commits violations of humanitarian law with certain weapons, 'ongoing assistance is necessarily given with a view to facilitating further violations. Such a strict standard may not be that of the ILC in its Commentary, but it is supported by the special obligation, under international humanitarian law, of the third State not only *not* to assist in violations, but also to "ensure respect" for the rules of international humanitarian law by all other States. A State providing assistance, knowing that the latter is used for violations, is certainly not complying with that specific obligation.' See also Brehm, pp. 385–386.

⁸⁴ This would require an appropriate assessment prior to any arms transfer. See Dörmann/Serralvo, pp. 732–735; Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context*, The Hague Academy of International Law, 2011, p. 223; and ICRC, *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria – A Practical Guide*, ICRC, Geneva, August 2016.

of peremptory norms of international law and not to render aid or assistance in maintaining such a situation.⁸⁵ These obligations are relevant for the Geneva Conventions inasmuch as they embody norms from which no derogation is permitted.⁸⁶ In its 2004 Advisory Opinion in the *Wall* case, the International Court of Justice seems to have linked the same obligations with Article 1 of the Fourth Convention.⁸⁷ These obligations can be seen, moreover, as a corollary of the duty neither to encourage nor to aid or assist in the *commission* of violations of the Conventions.

b. Positive obligations

- 197 The High Contracting Parties also have positive obligations under common Article 1, which means they must take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions, in particular by using their influence on that Party.⁸⁸ This obligation is not limited to stopping ongoing violations but

⁸⁵ See Draft Articles on State Responsibility (2001), Article 41(2).

⁸⁶ See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, para. 79 ('a great many rules of humanitarian law applicable in armed conflict ... constitute intransgressible principles of international customary law'); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 157; Draft Articles on State Responsibility (2001), commentary on Article 40, para. 5 ('the basic rules of international humanitarian law applicable in armed conflict' are part of peremptory norms of international law); ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, reproduced in *Report of the International Law Commission on the work of its fifty-eighth session*, UN Doc. A/61/10, 2006, Chapter XII, para. 251, subparagraph (33), p. 182 ('The most frequently cited examples of *jus cogens* norms are ... basic rules of international humanitarian law applicable in armed conflict.');

and ICTY, *Kupreškić Trial Judgment*, 2000, para. 520 ('most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character').

⁸⁷ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, paras 158–159. See also Tom Moerenhout, 'The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories', *Journal of International Humanitarian Law Studies*, Vol. 3, 2012, pp. 344–385.

⁸⁸ See 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, para. 2. See also ICRC, 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', A1308, 16 February 2005, reproduced in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400, at 396: 'Moreover, it is generally recognized that common Article 1 requires States that are not party to an armed conflict to strive to ensure respect for the law by taking every possible measure to put an end to violations of the law by a party to a conflict, in particular by using their influence on that party.' On the corresponding customary duty to ensure respect, see ICRC Study on Customary International Humanitarian Law (2005), Rule 144 ('[States] must exert their influence, to the degree possible, to stop violations of international humanitarian law.'). More cautious, Gasser, p. 32: 'In conclusion, it can be argued that a third-party State has at least an obligation to examine a situation involving a breach of humanitarian law by a belligerent and to consider in good faith whether action should be taken.'

includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred.⁸⁹

198 States remain in principle free to choose between different possible measures, as long as those adopted are considered adequate to ensure respect. The duty to ensure respect is to be carried out with due diligence. As noted above, its content depends on the specific circumstances, including the gravity of the breach, the means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach. Unlike the negative obligation described above, it is an obligation of means, i.e. the High Contracting Parties are not responsible for a possible failure of their efforts as long as they have done everything reasonably in their power to bring the violations to an end.⁹⁰

199 A similar due diligence obligation exists under Article 1 of the 1948 Genocide Convention, according to which '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'. In the *Genocide Convention* case, the International Court of Justice held:

[T]he obligation in question [to prevent genocide] is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance.⁹¹

⁸⁹ See 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, para. 2; Dörmann/Serralvo, pp. 728–732; Geiss, 2015a, p. 117; Devillard, pp. 96–97; Gasser, pp. 31–32; and Levrat, p. 277.

⁹⁰ See also ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, para. 430. See also ICRC Study on Customary International Humanitarian Law (2005), Rule 144 ('to the degree possible'); ICRC, 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', A 1308, 16 February 2005, reproduced in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400, at 396 ('taking every possible measure'); Condorelli/Boisson de Chazournes, p. 24 ('agir par tout moyen approprié'); Boisson de Chazournes/Condorelli, 2000, p. 69 ('take all possible steps'); Pfanner, p. 305 ('act by all appropriate means'); Bothe/Partsch/Solf, p. 43 ('any lawful means at their disposal in their international relations'); Benvenuti, p. 29 ('any lawful means at their disposal'); Azzam, p. 69 ('use all legal means at their disposal'); and Sandoz, p. 167 ('dans la mesure de ses possibilités').

⁹¹ ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, para. 430.

As for the applicable standard of due diligence, the Court considered:

Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.⁹²

200 The duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in a joint operation, even more so as this case is closely related to the negative duty neither to encourage nor to aid or assist in violations of the Conventions.⁹³ The fact, for example, that a High Contracting Party participates in the financing, equipping, arming or training of the armed forces of a Party to a conflict, or even plans, carries out and debriefs operations jointly with such forces, places it in a unique position to influence the behaviour of those forces, and thus to ensure respect for the Conventions.

201 In the case of the transfer of detainees to a co-belligerent, non-belligerent or neutral State, the High Contracting Parties should, even absent specific provisions dealing with post-transfer responsibilities (see e.g. Article 12(3) of the Third Convention), monitor the fate of those transferred and, if necessary, exercise their influence in order to ensure observance of the Conventions by the receiving State.⁹⁴

202 There is disagreement as to the legal nature of the positive component of the duty to ensure respect by others because the content of the obligation is not clearly defined and its concretization is to a large extent left to the High Contracting Parties.⁹⁵

⁹² *Ibid.*

⁹³ But see Reid:

At its most basic level, this appears uncontroversial. However, such an interpretation does not recognise the fact that States engaged in a joint operation often differ in their interpretations of the relevant obligations. ... In these cases, it is more appropriate to focus on the negative duty not to aid or assist in acts that one State believes are a contravention of its obligations, regardless of the views of the other State.

⁹⁴ See e.g. Colassis, pp. 467–468:

Transferring States, in particular, have greater means to ensure respect in contexts where they have a strong diplomatic and military presence in the receiving State, as is the case with the United States in Iraq. They can engage in a dialogue on the treatment of detainees and undertake other measures, such as post-transfer follow-up or capacity building at the different levels of the chain of custody, to ensure that the receiving State abides by its obligations.

See also the commentary on Article 3, section G.7, as well as on Article 12 of the Third Convention and on Article 45 of the Fourth Convention.

⁹⁵ For the view of the United States, see, in particular, Egan (*'as a matter of policy, [the United States] always seek[s] to promote adherence to the law of armed conflict generally and encourage[s] other States to do the same'* (emphasis added)) and Ney (*'although we always seek to promote*

203 The fact that common Article 1 is part of an international treaty, however, means that it is not a loose pledge but a commitment vested with legal force. This was affirmed by the International Court of Justice in the *Nicaragua* case where the Court considered that the clause reflected a legal obligation.⁹⁶ The term 'undertake' used in common Article 1 also underlines the High Contracting Parties' commitment to ensure respect by others. In its ordinary meaning to 'undertake' means to 'formally guarantee, pledge or promise'.⁹⁷ The International Court of Justice held that the term is 'not merely hortatory or purposive'.⁹⁸

204 In 1973, the existence of such a positive duty was expressly acknowledged by a number of States in response to a questionnaire sent out by the ICRC.⁹⁹ Since then, the UN Security Council,¹⁰⁰ the UN General Assembly,¹⁰¹ the UN Secretary-General,¹⁰² the Parliamentary Assembly of the Council of Europe,¹⁰³ and the High Contracting Parties themselves¹⁰⁴ have expressly

compliance with the law of war by others as a matter of policy, we do not agree with this legal interpretation [in the 2016 updated Commentary on the First Geneva Convention']. See also Robson, p. 115 ('There is no general duty to prevent or bring to an end breaches by other parties to conflict. Responsibility for compliance lies with the parties themselves, and other States may choose, as a matter of policy, to take such steps as are appropriate in each conflict to encourage universal respect.'). Kalshoven, pp. 59–61 ('a moral incentive'); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Kooijmans, 2004, paras 46–50 ('I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches.'). Focarelli, p. 125 ('a mere recommendation') and pp. 170–171 ('an unspecified recommendatory meaning'); Frutig; and Kolb, p. 518 ('une faculté d'intervenir ... mais ... pas l'existence d'une obligation en toutes circonstances' ('the power to act ... but ... not an obligation to do so in all circumstances')).

⁹⁶ ICJ, *Military and Paramilitary Activities in and against Nicaragua case*, Merits, Judgment, 1986, para. 220.

⁹⁷ *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 1573.

⁹⁸ On the meaning of the term 'undertake' in Article 1 of the 1948 Genocide Convention, see ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, para. 162 ('It is not merely hortatory or purposive. The undertaking is unqualified ...; and is not to be read merely as an introduction to later express references to [other obligations].').

⁹⁹ ICRC, Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, Geneva, 1973, answers to question 2 by the Federal Republic of Germany (p. 20), Belgium (p. 21), Republic of Korea (p. 23), United States (pp. 24–25) and United Kingdom (p. 30). The same view was expressed by Pakistan during the Diplomatic Conference: 'Article 1 common to the four Geneva Conventions of 1949 and article 70 of draft Protocol I implied that, if a Party failed to carry out its obligations, the other Contracting Parties were bound to endeavour to bring it back to an attitude of respect for its engagements.' *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Vol. VIII, p. 185, para. 3.

¹⁰⁰ UN Security Council, Res. 681, 20 December 1990, para. 5.

¹⁰¹ UN General Assembly, Res. 43/21, The uprising (*intifadah*) of the Palestinian people, 3 November 1988, para. 5.

¹⁰² UN Secretary-General, *Report on the situation in the territories occupied by Israel submitted in accordance with the UN Security Council Resolution 605 (1987)*, UN Doc. S/19443, 21 January 1988, para. 27.

¹⁰³ Council of Europe, Parliamentary Assembly, 39th Ordinary Session, Res. 881 (1987) on the activities of the International Committee of the Red Cross (ICRC) (1984–86), 1 July 1987, para. 21, see also para. 23(iii).

¹⁰⁴ See e.g. International Conference for the Protection of War Victims, Geneva, 1993, Final Declaration, Part II, para. 11, and 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, para. 2.

referred to a positive obligation to ensure respect. On this basis, the ICRC has called upon States to actively ensure compliance by other High Contracting Parties.¹⁰⁵ In 2004, the International Court of Justice concluded from Article 1 of the Fourth Convention 'that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'.¹⁰⁶

- 205 Certainly, the precise content of this positive obligation is difficult to determine in the abstract, yet this difficulty is not sufficient in itself to deny the existence of such an obligation. Common Article 1 is a living provision which must be interpreted in the overall context of the Conventions and, where applicable, the Protocols, and the international legal order as a whole. Its content will be further concretized and operationalized in the decades ahead.
- 206 Accordingly, there is a positive legal duty to ensure respect for the Conventions, and this is widely supported by experts and scholars.¹⁰⁷ It is in this sense that the corresponding customary duty to ensure respect for humanitarian law has been understood.¹⁰⁸

c. Limits of permissible action

- 207 Common Article 1 does not provide a ground to deviate from applicable rules of international law.¹⁰⁹ Most notably, it does not by itself justify a State or group

¹⁰⁵ See e.g. ICRC, Letter dated 18 October 1989 from the ICRC Director of Principles, Law and Relations within the Movement to two UK Members of Parliament, reproduced in Labour Middle East Council and Conservative Middle East Council (eds), *Towards a Strategy for the Enforcement of Human Rights in the Israeli Occupied West Bank and Gaza, A Working Symposium*, London, 25 July 1989, pp. vii–viii; ICRC Statement, The Balkan conflict and respect for international humanitarian law, 26 April 1999, reproduced in *International Review of the Red Cross*, Vol. 81, No. 834, June 1999, pp. 408–411, at 411; and ICRC, 'Myanmar: ICRC denounces major and repeated violations of international humanitarian law', News Release, 29 June 2007. See generally ICRC, 'Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence', A1308, 16 February 2005, reproduced in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 393–400, at 396.

¹⁰⁶ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 158; see also para. 159.

¹⁰⁷ See Sassòli/Bouvier/Quintin, pp. 368–369; Bothe/Partsch/Solf, p. 43; Kessler, 2001b, pp. 504–507; David, paras 3.13–3.13a; Levrat, pp. 267 and 276–279; Benvenuti, p. 29; Azzam, p. 68; Condorelli/Boisson de Chazournes, p. 24; Boisson de Chazournes/Condorelli, 2000, p. 69; Brehm, pp. 374–375; Sachariew, p. 184; Palwankar, p. 9; Sandoz, p. 167; Gasser, p. 32; Vöneky, para. 1432, pp. 696–697; Niyungeko, p. 127; Pfanner, pp. 304–305; Obradović, pp. 487–488; Fleck, p. 182; Zwanenburg, p. 108; and Dörmann/Serralvo. Five regional expert consultations on improving compliance with humanitarian law in 2003 also showed general agreement that this was a legal obligation; see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, Report prepared for the 28th International Conference of the Red Cross and Red Crescent, Geneva, 2003, p. 22.

¹⁰⁸ See ICRC Study on Customary International Humanitarian Law (2005), Rule 144.

¹⁰⁹ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 159 ('while respecting the United Nations Charter and international law'); Additional Protocol I, Article 89 ('in conformity with the United Nations Charter'); and 30th International Conference of the Red Cross and Red Crescent,

of States to engage in a 'threat or use of force' contrary to Article 2(4) of the UN Charter. Only the rules of international law on the resort to armed force (*jus ad bellum*) determine the legality of any threat or use of force, even where such force is meant to put an end to serious violations of the Conventions.

- 208 The obligation to ensure respect does not authorize derogations from the safeguards of the Conventions themselves as this would directly contravene the duty to respect their provisions 'in all circumstances'. Such derogations are only allowed to the extent that they constitute lawful reprisals.¹¹⁰
- 209 Furthermore, the fact that the law of neutrality requires neutral Powers to treat all Parties to an international armed conflict on a non-discriminatory basis does not absolve these Powers of their obligation to ensure respect under common Article 1. Conversely, common Article 1 does not provide a ground for violating the law of neutrality.¹¹¹
- 210 The principle of non-intervention is not as such an impediment to the taking of measures by third States pursuant to common Article 1. It follows from the *erga omnes partes* nature of the obligations under the Conventions that violations of their provisions by a High Contracting Party should not be seen as the exclusive internal affair of that Party, even if the violations took place in the context of a non-international armed conflict.¹¹²
- 211 Lastly, common Article 1 does not establish any primacy of collective measures over individual measures.¹¹³ Hence, in case of violations of the Conventions, each of the High Contracting Parties is entitled to resort individually to appropriate measures in order to put an end to the violations.¹¹⁴

Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, para. 2 ('in accordance with international law'). See also, with respect to the obligation to prevent genocide, ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, para. 430 ('every State may only act within the limits permitted by international law').

¹¹⁰ For the prohibitions of reprisals, see First Convention, Article 46; Second Convention, Article 47; Third Convention, Article 13(3); and Fourth Convention, Article 33(3). See also Additional Protocol I, Articles 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4).

¹¹¹ On the scope of application of the law of neutrality, see the commentary on Article 4, section J.2.d.

¹¹² See e.g. ICTY, *Kupreškić Trial Judgment*, 2000, para. 519, with regard to the *erga omnes* nature of most obligations imposed by rules of humanitarian law ('each and every member of the international community has a "legal interest" in their observance and consequently a legal entitlement to demand respect for such obligations'). See also Draft Articles on State Responsibility (2001), Article 48, and ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, Report prepared by the ICRC for the 28th International Conference of the Red Cross and Red Crescent, Geneva, 2003, p. 49 ('action taken pursuant to common Article 1 should not be understood as an illegal interference in the internal affairs of another State').

¹¹³ The same is the case for the duty to prevent genocide pursuant to Article 1 of the 1948 Genocide Convention; see ICJ, *Application of the Genocide Convention case*, Merits, Judgment, 2007, para. 427. But see Sachariew, p. 193, who expresses a general preference for collective measures.

¹¹⁴ See 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, para. 2.

Accordingly, Article 48(1)(b) of the 2001 Draft Articles on State Responsibility considers that any State is entitled to invoke the responsibility of a State in breach of *erga omnes* obligations. In practice, States do individually denounce violations of humanitarian law or resort to coercive measures in order to prevent or bring violations to an end.¹¹⁵ However, the particular gravity of certain violations of the Conventions may call for collective measures, particularly within the framework of the United Nations.¹¹⁶ This option is specifically provided for in Article 89 of Additional Protocol I, whereby '[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter'.

- 212 The obligations under common Article 1 and under Article 89 of Additional Protocol I exist independently of any other concept, such as 'the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity' recognized by the UN General Assembly and the UN Security Council.¹¹⁷

d. Overview of possible measures

- 213 Conceptually, it is possible to distinguish between individual and collective measures to ensure respect by others.¹¹⁸

- 214 Individual measures include:

- addressing questions of compliance within the context of a diplomatic dialogue;
- exerting diplomatic pressure by means of confidential protests or public denunciations;
- conditioning joint operations on a coalition partner's compliance with its obligations under the Conventions and/or planning operations jointly in order to prevent such violations;¹¹⁹

¹¹⁵ See the examples cited by Palwankar, p. 16.

¹¹⁶ Under general international law, there is at least a tendency towards a duty to cooperate; see Draft Articles on State Responsibility (2001), Article 41(1): 'States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.'

¹¹⁷ UN General Assembly, Res. 60/1, 2005 World Summit Outcome, 24 October 2005, paras 138–139, and UN Security Council, Res. 1674, 28 April 2006, para. 4. For a discussion of the related concept of 'humanitarian intervention' and humanitarian law, see Ryniker.

¹¹⁸ For an overview of measures, a number of which have been integrated into the following list, see Palwankar, pp. 12–24 (who distinguishes between measures to exert diplomatic pressure, coercive measures that States may take themselves, and measures taken in cooperation with international organizations, among others).

¹¹⁹ See e.g. Human rights due diligence policy on United Nations support to non-United Nations security forces, UN Doc. A/67/775–S/2013/110, 5 March 2013. In the context of MONUC, see e.g. UN Security Council, Res. 1906, 23 December 2009, para. 22; for further measures, see *ibid.* para. 9 ('Joint Protection Teams, Early Warning Centres, [and] communications liaisons with local villages').

- intervening directly with commanders in case of violations, for example an imminent unlawful attack against civilians, by a coalition partner;
- offering legal assistance to the Parties to the conflict and/or supporting assistance provided by others, such as instruction or training;
- acting as a Protecting Power in accordance with common Article 8 (Article 9 in the Fourth Convention) or a substitute in accordance with common Article 10 (Article 11 in the Fourth Convention);
- lending good offices to settle a disagreement on the application or interpretation of the Conventions in accordance with common Article 11 (Article 12 in the Fourth Convention);
- agreeing to set up an enquiry procedure concerning an alleged violation of the Convention in accordance with Article 132;
- referring, where applicable, a situation to the International Humanitarian Fact-Finding Commission;¹²⁰
- requesting a meeting of the High Contracting Parties;¹²¹
- applying measures of retorsion, such as the halting of ongoing negotiations or refusing to ratify agreements already signed, the non-renewal of trade privileges, and the reduction or suspension of voluntary public aid;
- adopting lawful countermeasures such as arms embargoes, trade and financial restrictions, flight bans and the reduction or suspension of aid and cooperation agreements;
- conditioning, limiting or refusing arms transfers;¹²²

¹²⁰ Additional Protocol I, Article 90(2)(a) and (d). See also Pfanner, p. 286:

In principle, the International Fact-Finding Commission can undertake an enquiry only if all the parties concerned have given their consent, but there is nothing to prevent a third state from requesting an enquiry by the Commission into a grave breach or serious violation of humanitarian law committed by a party to conflict, provided that the party concerned has also recognized the Commission's competence. This possibility arises out of the obligation to 'ensure respect for' the law of armed conflict.

¹²¹ Three conferences of the High Contracting Parties to the Fourth Convention have, with express reference to common Article 1, so far been convened to enforce that Convention in the occupied Palestinian territory: the first on 15 July 1999 (as recommended, among others, by UN General Assembly, Res. ES-10/6, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, 9 February 1999, para. 6); the second on 5 December 2001 (following UN General Assembly, Res. ES-10/7, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, 20 October 2000, para. 10); and the third on 17 December 2014 (as recommended by UN General Assembly, Res. 64/10, *Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 5 November 2009, para. 5). See also UN Security Council, Res. 681, 20 December 1990, para. 6.

¹²² See e.g. 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, Res. 2, Annex 1: Action Plan for Implementing International Humanitarian Law, Objective 5: Arms transfers; 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict; 28th International Conference of the Red Cross and Red Crescent, Geneva, 2003, Agenda for Humanitarian Action, Final goal 2(3); and Updated EU Guidelines on Compliance with International Humanitarian Law (2009), para. 16(i). See also Dörmann/Serralvo, p. 734; Boivin, pp. 475–479; Fleck, pp. 182–183; and Brehm, pp. 375–377. The 2013 Arms Trade Treaty requires States Parties to deny a proposed arms transfer if the transfer would violate specified international obligations, or if the State Party has knowledge

- referring the issue to a competent international organization, e.g. the UN Security Council or General Assembly;¹²³
- referring, where possible, a specific issue to the International Court of Justice or another body for the settlement of disputes;¹²⁴
- resorting to penal measures to repress violations of humanitarian law;¹²⁵ and
- supporting national and international efforts to bring suspected perpetrators of serious violations of international humanitarian law to justice.¹²⁶

215 Many of these measures, as well as more general measures designed to clarify the law or improve compliance with the Conventions, may equally be taken collectively by a group of States¹²⁷ or within the framework of an international organization.¹²⁸ A particular role in ensuring compliance with the Conventions falls upon the United Nations, a role that in 1977 was expressly recognized in Article 89 of Additional Protocol I. The United Nations has increasingly become active in this respect and has engaged in a variety of activities ranging from the condemnation of specific violations and the deployment of fact-finding missions to the adoption of sanctions under Chapter VII of the 1945 UN Charter and the deployment of peace operations with a mandate to protect civilians.¹²⁹

216 As regards measures the High Contracting Parties may adopt vis-à-vis States party to a non-international armed conflict, reference can be made to essentially the same measures available in the context of international armed conflict. In practice, States and international organizations regularly denounce

that the transferred arms would be used to commit genocide, crimes against humanity or war crimes. For exports that are not denied on this basis, States Parties must apply certain risk assessment criteria and deny the proposed export where there is an overriding risk that exported arms could be used to commit or facilitate serious violations of international humanitarian law or of international human rights law, or other serious crimes (Articles 6–7).

¹²³ See UN Charter (1945), Article 35(1).

¹²⁴ See e.g. ICJ, *Armed Activities on the Territory of the Congo case*, Judgment, 2005, Separate Opinion of Judge Simma, para. 34:

Thus, regardless of whether the maltreated individuals were Ugandans or not, Uganda had the right – indeed the duty – to raise the violations of international humanitarian law committed against the private persons at the airport. The implementation of a State party's international legal duty to ensure respect by another State party for the obligations arising under humanitarian treaties by way of raising it before the International Court of Justice is certainly one of the most constructive avenues in this regard.

¹²⁵ See e.g. ICTY, *Tadić* Decision on the Defence Motion on Jurisdiction, 1995, para. 71 ('The requirement in common Article 1 that all Contracting Parties must respect and ensure respect for the Conventions may entail resort to penal measures.').

¹²⁶ See also Additional Protocol I, Article 88, on mutual assistance in criminal matters.

¹²⁷ See e.g. Montreux Document on Private Military and Security Companies (2008).

¹²⁸ See e.g. the list of means of action contained in the 2009 Updated EU Guidelines on Compliance with International Humanitarian Law, para. 16, setting out the operational tools for the EU and its institutions and bodies to promote compliance with humanitarian law.

¹²⁹ For further details, see the commentary on Article 89 of Additional Protocol I.

violations of common Article 3, including by non-State armed groups, and adopt economic and other non-military sanctions.¹³⁰

F. The phrase ‘in all circumstances’

217 Lastly, the High Contracting Parties have undertaken to respect and to ensure respect for the Conventions ‘in all circumstances’. This phrase was originally linked to the abolishment of the so-called *si omnes* clause,¹³¹ a provision contained, among others, in the 1906 Geneva Convention and in the 1907 Hague Conventions to the effect that the Conventions were only applicable if all of the belligerents in a given conflict were party to it.¹³² In 1929, the drafters felt that the participation of a State not party to the Conventions in a conflict should no longer affect the binding nature of the Conventions on those belligerents who were party to the Conventions. As noted earlier, in the course of the drafting process the obligation to ensure respect in all circumstances and the obligation to apply the Conventions in relation to other Contracting

¹³⁰ See, generally, Updated EU Guidelines on Compliance with International Humanitarian Law (2009), para. 2: ‘These Guidelines are in line with the *commitment* of the EU and its Member States to IHL, and aim to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States’ (emphasis added). Specific examples include the sanctions adopted by the UN Security Council against: UNITA (e.g. UN Security Council, Res. 864, 15 September 1993, section B, para. 19); Liberia, including non-State actors (e.g. UN Security Council, Res. 1521, 22 December 2003, section B, paras 2 and 4); foreign and Congolese armed groups and militias operating in the Democratic Republic of the Congo (e.g. UN Security Council, Res. 1493, 28 July 2003, para. 20); Côte d’Ivoire (e.g. UN Security Council, Res. 1572, 15 November 2004, paras 7, 9 and 11); and non-governmental entities and individuals operating in Darfur (e.g. UN Security Council, Res. 1556, 30 July 2004, paras 7 and 8). For an overview of the issue of enforcing compliance by non-State parties, see Kessler, 2001a, pp. 219–234.

¹³¹ It was in an amendment to draft article 24 of the 1929 Geneva Convention on the Wounded and Sick, submitted by the UK delegate, that the obligation to respect the Convention in all circumstances made its first appearance:

Les dispositions de la présente Convention doivent être respectées par les Hautes Parties Contractantes en toutes circonstances, sauf dans le cas où une Puissance belligérante ne serait pas partie à cette dernière. En ce cas, les dispositions de la Convention ne seront pas applicables entre ce belligérant et ses adversaires, mais devront néanmoins être respectées dans les rapports entre les belligérants parties à la Convention.

(‘The High Contracting Parties shall respect the provisions of the present Convention in all circumstances, except where a belligerent Power is not party to the Convention. In that case, the provisions of the Convention shall not apply between this belligerent and its adversaries but must nonetheless be respected in relations between the belligerents who are Parties to the Convention.’) *Proceedings of the Geneva Diplomatic Conference of 1929*, pp. 300 and 322.

¹³² Geneva Convention (1906), Article 24: ‘The provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention.’ See also St Petersburg Declaration (1868), ninth paragraph; Hague Convention (IV) (1907), Article 2; Hague Convention (V) (1907), Article 20; Hague Convention (VI) (1907), Article 6; Hague Convention (VII) (1907), Article 7; Hague Convention (VIII) (1907), Article 7; Hague Convention (IX) (1907), Article 8; Hague Convention (X) (1907), Article 18; Hague Convention (XI) (1907), Article 9; Hague Convention (XII) (1907), Article 51, first paragraph; Hague Convention (XIII) (1907), Article 28; Hague Declaration (XIV) (1907), third paragraph; and London Declaration concerning the Laws of Naval War (1909), Article 66.

Parties, even if not all belligerents are party to the Conventions, were separated into two different paragraphs, whereby the former acquired an independent meaning.¹³³ The latter is now explicitly provided for in common Article 2(3), namely that even where not all Parties to an armed conflict are party to the Conventions, those who are party remain bound by the Conventions in their mutual relations.¹³⁴

- 218 Furthermore, as mentioned above (para. 151), the words ‘in all circumstances’ indicate that the obligations to respect and to ensure respect apply both during armed conflict and in peacetime, depending on the obligation in question. The fact that certain provisions of the Conventions must already be implemented in peacetime is clearly alluded to in common Article 2(1) (‘In addition to the provisions which shall be implemented in peacetime’).¹³⁵
- 219 The undertaking to respect and to ensure respect ‘in all circumstances’ also reaffirms the strict separation of *jus ad bellum* and *jus in bello* as one of the basic safeguards for compliance with the Conventions. In other words, the application of the Conventions does not depend on the legal justification for the conflict under the *jus ad bellum*. As soon as one of the conditions of application for which common Article 2 or 3 provides is present, no State bound by the Conventions can offer any valid pretext, legal or other, for not respecting the Conventions in their entirety and in regard to all whom they protect. Whether an armed conflict is ‘just’ or ‘unjust’, whether it is a war of aggression or of resistance to aggression, the Conventions’ guarantees are in no way affected.¹³⁶ Accordingly, self-defence against an armed attack (see Article 51 of the UN Charter) does not preclude the wrongfulness of violations of the Conventions,¹³⁷ nor does the fact that the High Contracting Parties are acting on the basis of a UN Security Council mandate.
- 220 Furthermore, a military, economic, geographical or other factual inequality of the Parties to the conflict does not affect their obligations under the

¹³³ The obligation to ensure respect in all circumstances became the first paragraph of Article 82 of the 1929 Geneva Convention on Prisoners of War, and the obligation to apply the Conventions in relation to other Contracting Parties, even if not all belligerents are party to the Conventions, became the second paragraph of Article 82: ‘In time of war if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto.’ The same is the case for the 1929 Geneva Convention on the Wounded and Sick, Article 25, which is drafted in almost identical terms. For a detailed overview of the drafting history, see Kalshoven, pp. 6–10, and Dörmann/Serralvo, pp. 712–716.

¹³⁴ For more details, see the commentary on Article 2, section F.1. This is independent of the fact that all States remain bound by customary international law.

¹³⁵ For more details, see the commentary on common Article 2, section C.

¹³⁶ This principle has been expressly reaffirmed in Additional Protocol I, Preamble, para. 5. But see Kalshoven, p. 48: ‘The need to include this language effectively defeats the argument that common Article 1 once and for all had settled these issues.’

¹³⁷ See Draft Articles on State Responsibility (2001), commentary on Article 21, para. 3, according to which the Geneva Conventions and Additional Protocol I ‘apply equally to all the parties in an international armed conflict’, with reference to ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, para. 79 (‘intransgressible principles of international customary law’).

Conventions; the Conventions must be observed regardless of actual capacity. A differential application based on means available is possible for provisions that reflect an obligation of means.¹³⁸ Obligations that impose a minimum may also be applied in a differential manner above that minimum.¹³⁹

- 221 The words 'in all circumstances' moreover support the non-reciprocal nature of the Conventions, which bind each High Contracting Party regardless of whether the other Parties observe their obligations.¹⁴⁰ This principle is expressly acknowledged in Article 60(5) of the 1969 Vienna Convention on the Law of Treaties, which excludes the termination or suspension of the operation of a treaty as a consequence of its material breach with regard to 'provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.
- 222 On the other hand, respect 'in all circumstances' does not seem to imply, by itself, an absolute prohibition on reprisals beyond those prohibitions specifically provided for in the Conventions,¹⁴¹ although there is support for such reasoning in the case law of the ICTY.¹⁴² That was also the situation under customary international law as assessed in 2005.¹⁴³
- 223 The phrase 'in all circumstances' would, however, seem to exclude to a large extent recourse to the so-called 'circumstances precluding wrongfulness' recognized under the general law of State responsibility in order to justify violations of the Conventions.¹⁴⁴ The 2001 Draft Articles on State Responsibility

¹³⁸ See e.g. First Convention, Article 15(1); Second Convention, Article 18(1); Third Convention, Articles 109(2) and 111; and Fourth Convention, Article 76(1).

¹³⁹ See e.g. the rules on the provision for the basic needs of persons deprived of their liberty (food, water, clothing, shelter and medical attention) contained in Articles 25–32 of the Third Convention and Articles 76, 85, 87 and 89–92 of the Fourth Convention. In its Partial Award on Eritrea's Claim concerning Prisoners of War, the Eritrea-Ethiopia Claims Commission observed that Eritrea and Ethiopia could not, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure could not excuse a failure to grant the minimum standard of medical care required by humanitarian law; *Prisoners of War, Eritrea's Claim*, Partial Award, 2003, para. 138.

¹⁴⁰ See 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict, Preamble ('*recalling* that the obligation to respect international humanitarian law binds all parties to an armed conflict, and *emphasizing* that this obligation is not based on reciprocity'), and ICTY, *Kupreškić* Trial Judgment, 2000, para. 517. On the customary character of this principle, see ICRC Study on Customary International Humanitarian Law (2005), Rule 140. On the 1929 Convention, see Condorelli/Boisson de Chazournes, p. 19.

¹⁴¹ See First Convention, Article 46; Second Convention, Article 47; Third Convention, Article 13(3); and Fourth Convention, Article 33(3). See also Additional Protocol I, Articles 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4).

¹⁴² See ICTY, *Martić* Rule 61 Decision, 1996, para. 15.

¹⁴³ According to Henckaerts/Doswald-Beck, p. 523, 'it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities'.

¹⁴⁴ See also Vöneky, para. 1402 (violations of the Geneva Conventions, Additional Protocol I and customary law are not lawful 'because of recourse to certain circumstances precluding

enumerate six circumstances that, if shown to exist, preclude the wrongfulness of an act that would otherwise constitute a breach of a State's international obligations. Those circumstances are: (a) consent; (b) self-defence; (c) counter-measures; (d) *force majeure*; (e) distress; and (f) necessity.¹⁴⁵ As far as violations of the Conventions are concerned, consent may not serve as a justification, as may be inferred from the prohibition on absolving oneself or any other High Contracting Party of any liability incurred in respect of breaches of the Conventions.¹⁴⁶ The same idea is expressed in the provision that protected persons may not renounce the rights secured to them by the Conventions.¹⁴⁷ Recourse to the circumstance of national self-defence against an armed attack in order to justify violations of the Conventions is excluded, as previously discussed, by the strict separation of *jus in bello* and *jus ad bellum*.¹⁴⁸ In addition, it is generally agreed that military necessity, subject to provisions that specifically provide for exceptions,¹⁴⁹ may not justify violations of the Conventions as military necessity has already been taken into account in the formulation of their provisions.¹⁵⁰ Similar considerations apply to distress.¹⁵¹

- 224 In respect of countermeasures in response to an internationally wrongful act other than a violation of the rules of humanitarian law, the Draft Articles expressly provide that these shall not affect 'obligations of a humanitarian character prohibiting reprisals'.¹⁵² Given that, as previously observed, not even self-defence against unlawful attacks may justify violations of the Conventions – and the Protocols where applicable – one may, however, wonder whether this exception should not have been formulated more broadly to cover generally all 'obligations of a humanitarian character', regardless of whether these fall under the prohibition of reprisals.¹⁵³ Lastly, Article 26 of the Draft Articles stipulates that none of the six circumstances may preclude the

wrongfulness, as for instance self-defence, consent of the victim state, a state of necessity, and so on').

¹⁴⁵ Draft Articles on State Responsibility (2001), Articles 20–25 respectively.

¹⁴⁶ See First Convention, Article 51; Second Convention, Article 52; Third Convention, Article 131; and Fourth Convention, Article 148.

¹⁴⁷ See common Article 7 (Article 8 of the Fourth Convention).

¹⁴⁸ See also Draft Articles on State Responsibility (2001), commentary on Article 21, para. 3: 'As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.'

¹⁴⁹ See e.g. First Convention, Articles 8(3), 33(2) and 34(2); Second Convention, Articles 8(3) and 28; Third Convention, Article 126(2); and Fourth Convention, Articles 27(4), 42, 53, 55(3), 78(1), 108(2) and 143(3).

¹⁵⁰ On the issue of 'military necessity', see Draft Articles on State Responsibility (2001), commentary on Article 25, para. 21, which considers that 'while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations'; see also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 140.

¹⁵¹ Sassòli, p. 417.

¹⁵² Draft Articles on State Responsibility (2001), Article 50(1)(c).

¹⁵³ Sassòli, pp. 425–426.

wrongfulness of violations of peremptory norms of international law, which the ILC itself understood to cover also the basic rules of humanitarian law.¹⁵⁴

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¹⁵⁴ Draft Articles on State Responsibility (2001), commentary on Article 40, para. 5. For an overview of the different circumstances precluding wrongfulness, see Sassòli, pp. 413–417.

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